UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16427

In the Matter of

Robert J. Lunn,

Respondent.

DIVISION OF ENFORCEMENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Introduction

On April 30, 2015, the Administrative Law Judge issued an Order Directing Supplemental Briefing and Additional Evidence directing the Division of Enforcement ("Division") to file supplemental briefing and additional evidence in support of its Motion for Summary Disposition in light of the Commission's remand order in Gary L. McDuff, Exchange Act Rel. No. 74803, 2015 WL 1873119 (Apr. 23, 2015). As discussed below, the current situation is distinguishable from McDuff because: a) Respondent Robert J. Lunn ("Lunn" or "Respondent") has admitted that he was associated with a broker-dealer and an investment adviser; and b) the record in U.S. v. Robert J. Lunn clearly shows that Lunn was convicted of a fraudulent scheme that extended for at least two years and involved specific elements that fall within the parameters for a bar under the Securities Exchange Act of 1934 ("Exchange Act") and the Investment Advisers Act of 1940 ("Advisers Act").

As a result, the Division respectfully requests that the Administrative Law Judge grant the Division's Motion for Summary Disposition and enter an order barring Lunn from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"), and from participating in any offering of a penny stock.

ARGUMENT

Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act impose only three requirements for a bar in a follow-on proceeding based on a criminal conviction: (1) that a person who was associated with a broker or dealer or an investment adviser at the time of the conduct was convicted within 10 years of the commencement of the administrative proceeding; (2) that the conviction was for a felony or misdemeanor which involves any one of the acts specified in Exchange Act Section 15(b)(4)(B) or Advisers Act Section 203(e)(2) or (3), which include, among other things, the misappropriation of funds, conduct arising out of the conduct of an investment adviser, and the making of a false report; and (3) that the bar is in the public interest. If the first two requirements are met, the only remaining issue is whether a bar would serve the public interest. See, e.g., Shaw Tehrani, Init. Decision Rel. No. 42, 1993 WL 528211, at *2 (Dec. 15, 1993); Ross Mandell, Exchange Act Rel. No. 71688, 2014 WL 907416 (March 7, 2014).

In McDuff, the Commission found that the existing record did not contain sufficient evidence to establish one of the statutory requirements for a proceeding under Exchange Act Section 15(b)(6) or to support a sanctions analysis. Exchange Act Rel. No. 74803, 2015 WL 1873119 (April 23, 2015). Specifically, the Commission found that the law judge erred in relying upon a default judgment as the basis for finding that the respondent was acting as an unregistered broker or dealer. Id. The Commission further found that the law judge erred in relying on

allegations in the civil complaint on which the respondent defaulted and a superseding indictment on which a jury returned a general verdict as the sole bases for his analysis that a bar was in the public interest. Id.

Unlike McDuff, Lunn was and has admitted being associated with a registered investment adviser and a registered broker-dealer during the period of his conduct. In addition, the jury instructions for U.S. v. Robert J. Lunn, Case No. 12 CR 402 (N.D. Ill.), set out each of the specific elements the government needed to prove beyond a reasonable doubt for the jury to find Lunn guilty of the five counts of the Indictment and speak directly to the public interest factors set out in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). Moreover, similar to the Commission's discussion of the public interest determination in Ross Mandell, Exchange Act Rel. No. 71668, 2014 WL 907416 (March 7, 2014), the District Court's Order denying Lunn's Motion for Judgment of Acquittal or New Trial made express findings about what the jury would have concluded from the evidence presented at Lunn's criminal trial and thus supports the imposition of an industry-wide collateral bar.

A. Lunn Was Associated with a Registered Investment Adviser and a Registered Broker-Dealer During the Relevant Time

Between at least May 2001 and September 2004, Lunn was associated with Lunn Partners Securities, LLC ("Lunn Partners Securities"), a registered broker-dealer that Lunn owned and operated. (See Division of Enforcement's Brief in Support of its Motion for Summary Disposition ("Brief") Exs. A, D, E, F, G, and H.) During that same time frame, Lunn also owned and operated Lunn Partners, LLC ("Lunn Partners"), a registered investment adviser. Id. Until 2004, Lunn also held the following FINRA securities licenses: General Securities Sales Supervisor, General Securities Principal, and Registered Representative. Id. In his Answer, Lunn admitted each of these facts and also admitted that he spent at least 34 years in the securities industry. (Brief Ex. E ¶

1.) The jury instructions for U.S. v. Lunn required the jury to find that the crimes happened "reasonably close to" the dates charged in the Indictment. (Brief Ex. I at 21.) By finding Lunn guilty of each of the five counts of the Indictment, the jury necessarily found that Lunn committed the crimes reasonably close to the time frame of May 2001 to September 2004 and that the crimes were recurrent, not isolated, incidents that occurred throughout that time period.

B. The Jury Instructions for U.S. v. Lunn Establish the Basis for a Collateral Bar

As explained in the Division's Brief, the Indictment against Lunn alleged five counts of bank fraud in violation of 18 U.S.C. §1344 based on Lunn's scheme to defraud Leaders Bank, an Oak Brook, Illinois financial institution, and Clients A and B, who were investment advisory clients of Lunn and Lunn Partners (Brief Ex. A.) The counts of the Indictment alleged that between approximately May 2001 and September 2004, Lunn fraudulently obtained approximately $3,220,000 in loans from Leaders Bank based on a series of misrepresentations about his own financial assets, the purposes of the loans, and the authorization of his advisory clients purportedly seeking certain of the loans. Id.

Each of the five counts alleged that Lunn, on a specific date, in furtherance of the scheme, knowingly caused Leaders Bank to make a disbursement for Lunn's benefit:

> Count I: A disbursement of $1,400,000 on Sept. 20, 2002 from loan proceeds purportedly for the benefit of Lunn Client A to an account held by an unrelated complaining investment adviser client;
>
> Count II: A disbursement of approximately $656,280 on February 18, 2004, from Lunn's line of credit to a Lunn Partners account at another bank;
>
> Count III: A disbursement of approximately $85,000 on April 19, 2004, from Lunn's line of credit to a Lunn Partners account at another bank;
>
> Count IV. A disbursement of approximately $35,000 on April 20, 2004, from Lunn's line of credit to a Lunn Partners account at another bank;

Count V: A disbursement of approximately $493,500 on June 21, 2004, in proceeds from a loan for the benefit of Lunn Client B to an account controlled by Lunn;

(Brief Ex. A.)

The jury instructions in U.S. v. Lunn set out the specific elements required to find Lunn guilty of each count of the Indictment. Specifically, the jury instructions stated that the jury needed to find that the government proved each of the following five elements for each of the counts beyond a reasonable doubt:

1. There was a scheme to defraud a bank or to obtain money or funds owned by, or in the custody or control of, a bank by means of false or fraudulent pretenses, representations or promises as charged in the indictment;
2. [Lunn] knowingly executed the scheme;
3. [Lunn] acted with the intent to defraud;
4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and
5. At the time of the charged offense the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

(Brief Ex. I at 13.)

The jury instructions further stated that "in considering whether the government has proven a scheme to obtain moneys or funds from a bank by means of false pretenses, representations or promises, the government must prove at least one of the false pretenses, representations, promises, or acts charged in the portion of the indictment describing the scheme." (Brief Ex. I at 15-16.) By finding Lunn guilty of each of the five counts of the Indictment, the jury necessarily found that on five occasions Lunn committed the crimes by obtaining funds by means of false or fraudulent pretenses, representations or promises as charged in the Indictment. These pretenses,

representations and promises included representations that Lunn was acting on behalf of two of his investment advisory clients, Client A - Scottie Pippen ("Pippen") and Client B - Robert Geras ("Geras"), and that Lunn misrepresented his own stock holdings. (Brief Ex. I at 29-35).

The jury instructions also establish the egregiousness and high degree of scienter involved in Lunn's misconduct. Specifically, the jury was instructed that "knowingly" executing the scheme and acting "with the intent to defraud" mean that a person "realizes what he is doing and is aware of the of the nature of his conduct, and does not act through ignorance, mistake, or accident" and "acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another." (Brief Ex. I at 17-18). As a result, by finding Lunn guilty of each of the five counts of the Indictment, the jury necessarily found that Lunn committed the crimes intentionally and with a high degree of scienter.

C. The Court's Order Denying Lunn's Motion for Judgment of Acquittal or New Trial Further Establishes the Basis for a Collateral Bar

On January 15, 2015, the Court in U.S. v. Lunn issued an Order denying Lunn's Motion for Judgment of Acquittal or New Trial. (See Order attached as Ex. 1.) In the Order, the Court reiterated the five elements the government needed to prove to establish bank fraud under 18 U.S.C. §1344 and concluded that "[t]he record contains sufficient evidence to support the jury's verdict on each count" of the Indictment. Id. The Court further found that Lunn's advisory clients, Pippen and Geras, testified "they did not authorize [Lunn] to take loans out in their names," that Lunn "admitted that he signed Pippen and Geras's names on the various loan documents," and that Lunn "submitted or caused to be submitted false financial statements . . . falsely claim[ing] to own stock in Lehman Brothers and Morgan Stanley worth millions of dollars, which he knew that he had sold years earlier in the 1990's." (Id. at 2.) Based on this evidence, the Court concluded that

the record contained sufficient evidence to support the jury's guilty verdict on each of the five counts and accordingly denied Lunn's motion. (Id. at 2.) In Ross Mandell, the Commission similarly drew facts from both the indictment underlying a criminal conviction and an order denying a motion for acquittal or new trial to find that a bar was in the public interest. Exchange Act Rel. No. 71688, 2014 WL 907416, at *2-3, n. 13, n. 14 (March 7, 2014).

Accordingly, based on this precedent, it is appropriate to draw upon the criminal Indictment, the jury instructions, and the Court's Order denying Lunn's Motion for Judgment of Acquittal or New Trial as well as the other evidence attached to the Division's Brief and find that a collateral bar is appropriate and in the public interest against Lunn.

CONCLUSION

For the reasons set forth above, the Division respectfully requests that the Administrative Law Judge grant the Division's Motion for Summary Disposition and enter an order granting the requested relief.

Dated: May 8, 2015

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 12 CR 402
v.	)	
	)	Hon. Charles R. Norgle
ROBERT LUNN	)	

ORDER

Defendant's Motion for Judgment of Acquittal or New Trial [74] is denied.

STATEMENT

On October 17, 2014, a jury found Defendant Robert Lunn ("Defendant") guilty of five counts of bank fraud, in violation of 18 U.S.C. § 1344, as charged in the indictment. The jury found that Defendant defrauded Leaders Bank in connection with lines of credit that he obtained personally (Counts 2, 3, and 4), and loans that he obtained for investment advisory clients Scottie Pippen ("Pippen") (Count 1) and Robert Geras ("Geras") (Count 5). Before the Court is Defendant's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or, in the alternative, a new trial pursuant to Rule 33. For the following reasons, the motion is denied.

Rule 29 permits a defendant to "move for a judgment of acquittal even after a guilty verdict is entered if he does not believe the evidence is sufficient to sustain a conviction." United States v. Torres-Chavez, 744 F.3d 988, 993 (7th Cir. 2014) (citing Fed. R. Crim. P. 29(c)(1)). In challenging the sufficiency of the evidence, Defendant "faces a nearly insurmountable hurdle." Id. (citing United States v. Blassingame, 197 F.3d 271, 284 (7th Cir. 1999)). The Court views the evidence in the light most favorable to the government, and asks whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). A jury verdict will be overturned only "when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Id. (internal quotation marks and citation omitted).

To establish bank fraud under 18 U.S.C. § 1344, the government was required to prove: (1) that there was a scheme to defraud a bank or to obtain money or funds owned by, or in the custody or control of, a bank by means of false or fraudulent pretenses, representations or promises; (2) that the defendant knowingly executed the scheme; (3) that the defendant did so with the intent to defraud; (4) that the scheme involved a materially false or fraudulent pretense, representation or promise; and (5) that at the time of the charged offense, the financial institution was insured by the Federal Deposit Insurance Corporation. Pattern Criminal Jury Instructions of the Seventh Circuit at 411 (2012 ed.); see also United States v. Antonelli, 234 F.3d 1274 (7th Cir. 2000) (non-precedential order).

Defendant argues generally that a reasonable jury could not have found him guilty beyond a reasonable doubt based upon the evidence admitted at trial. Defendant's argument, however, is largely based on the fact that the jury did not accept his version of events. For instance, with respect to the loan Defendant fraudulently obtained in Pippen's name (Count 1),

Defendant argues that, because the bank did not put a lien on the airplane allegedly purchased by Pippen, the bank did not believe or care whether Pippen actually purchased an airplane with the loan. Defendant contends that the bank's alleged indifference renders immaterial the fact that the $1.4 million loan Defendant took out in Pippen's name did not go towards its stated purpose of purchasing an airplane. As to the $500,000 loan Defendant fraudulently obtained in Geras's name (Count 5), Defendant argues that the jury should have rejected Geras's testimony that he declined to participate in Defendant's proposed investment deal because he did not understand it. Defendant maintains that Geras's testimony that he did not understand the investment deal was not credible because Geras was a sophisticated business investor. Lastly, Defendant argues that there was insufficient evidence to link him to the financial statement dated December 31, 2003, which Defendant used to fraudulently obtain the second and third lines of credit from the bank. On direct examination, Defendant testified that he did not draft the December 31, 2003 financial statement. On cross-examination, however, Defendant admitted that he told the Federal Bureau of Investigation that he signed the December 31, 2003 financial statement.

Defendant's arguments attack the credibility of the witnesses and question the weight that the jury gave to Defendant's version of events. It is not the Court's role however, to weigh the evidence or make credibility determinations—that duty belongs to the jury alone. United States v. Brown, 328 F.3d 352, 355 (7th Cir. 2003). The record contains sufficient evidence to support the jury's verdict on each count. Both Pippen and Geras testified that they did not authorize Defendant to take loans out in their names, and Defendant admitted that he signed Pippen and Geras's names on the various loan documents. With respect to the lines of credit that Defendant obtained personally, he submitted or caused to be submitted false financial statements. In the financial statements dated December 31, 2000 and December 31, 2003, Defendant falsely claimed to own stock in Lehman Brothers and Morgan Stanley worth millions of dollars, which he knew that he had sold years earlier in the 1990's. Officers and directors from the bank testified that they relied on this false information when issuing Defendant the lines of credit. Because the record contains evidence from which the jury could reach a guilty verdict, Defendant's Rule 29 motion is denied. See Torres-Chavez, 744 F.3d at 993 ("[W]e defer to the credibility determination of the jury and overturn a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." (internal quotation marks and citations omitted)).

Next, Defendant argues that he is entitled to a new trial because the Court's evidentiary decisions made during trial restricted his testimony and deprived him of the right to present a full defense. Under Rule 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A Rule 33 motion, however, is disfavored and is properly granted only in "the most extreme cases." United States v. Linwood, 142 F.3d 418, 422 (7th Cir. 1998) (internal quotation marks and citation omitted).

First, Defendant argues that the Court erred when it precluded him from presenting to the jury and testifying about a separate loan and a contract that Pippen allegedly entered into to purchase an airplane. The Court ruled that the testimony was hearsay, as there was no such contract in evidence, and that Defendant otherwise lacked personal knowledge about the alleged contract. Because Defendant was unable to overcome the government's hearsay objections, the testimony and evidence were properly excluded.

Second, Defendant argues that the Court improperly prevented him from testifying about an out-of-court conversation that he had with the bank president, James Lynch. Defendant is mistaken. The Court ruled that Defendant could testify regarding his conversation with James Lynch, as well as conversations with Pippen, by telling the jury the actual words spoken by each person.

Third, Defendant argues that the Court erred when it prevented him from testifying about the sale of his assets in bankruptcy and the alleged repayments made to Pippen and the bank. The Court, however, properly ruled that Defendant's bankruptcy and the subsequent sale of his assets were irrelevant to the charges against him in the instant case, and otherwise constituted inadmissible hearsay as out of court statements offered for their truth. See Fed. R. Evid. 801(c). In sum, Defendant's Rule 33 motion for a new trial based on the Court's evidentiary rulings during trial is denied.

Lastly, Defendant argues that he is entitled to a judgment of acquittal or a new trial because the Court failed to give a good faith defense jury instruction. "Defendants are not automatically entitled to any particular theory-of-defense jury instruction." United States v. Walker, 746 F.3d 300, 307 (7th Cir. 2014) (citing United States v. Choiniere, 517 F.3d 967, 970 (7th Cir. 2008)). "A defendant is only entitled to a jury instruction that encompasses his theory of defense if '(1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence; (3) the instruction reflects a theory which is not already part of the charge; and (4) the failure to include the instruction would deny the [defendant] a fair trial.'" Id. (quoting United States v. Swanquist, 161 F.3d 1064, 1075 (7th Cir. 1998)).

Defendant states that his "defense was that he did not knowingly deceive Leaders Bank, meaning that all representations that he made to Leaders Bank were made in good faith." Def.'s Mot. for Judgment of Acquittal or New Trial ¶ 10. Specifically, Defendant contends that he "believed that the representations made to the bank by or on behalf of Scottie Pippen and Robert Geras were correct and were authorized" and "that he was not deceiving Leaders Bank when he applied for the line of credit and the extensions to the line of credit." Id. Defendant's beliefs, however, are not supported by any law or evidence presented at trial. See United States v. Warner, 498 F.3d 666, 691 (7th Cir. 2007) ("[T]he defendants claim that the district court erred in excluding evidence that showed Ryan's good faith, Ryan's lack of fraudulent intent and the reasonableness of Ryan's belief about the bona fides of the transactions at issue in this case . . . . This court, however, 'do[es] not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith.'" (quoting United States v. Longfellow, 43 F.3d 318, 321 (7th Cir. 1994))). "Because defense counsel failed to offer any evidentiary basis for his good faith defense, the . . . court's action in refusing to give the tendered good faith instruction was proper." United States v. Otto, 850 F.2d 323, 327 (7th Cir. 1988). Accordingly, Defendant's motion for judgment of acquittal or for a new trial on this issue is denied.

For the foregoing reasons, Defendant's motion is denied.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: January 15, 2015